

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION**

**UNITED STATES OF AMERICA,**

\*

**Plaintiff,**

\*

**v.**

\*

**Case No.: 2:22-CR-20134-MSN**

**COURTNEY WESTMORELAND,**

\*

**Defendant.**

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**DEFENDANT’S POSITION REGARDING THE  
PRESENTENCE INVESTIGATION REPORT**

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Courtney Westmoreland, through counsel of record, Angela D. Smith, hereby submits her position paper regarding the Presentence Investigation Report. In support, Ms. Westmoreland would submit the following:

**Position with Respect to the Presentence Investigation Report**

On January 11, 2023, Probation prepared its draft Presentence Investigation Report (“PSR”). Defense counsel and Ms. Westmoreland have reviewed the PSR together. Ms. Westmoreland has the following objections to the PSR.

**I. Ms. Westmoreland Objects to the Six-Level Enhancement for the intended loss amount.**

The PSR attributes a six-level enhancement to Ms. Westmoreland’s guideline calculations based on an intended loss amount of \$48,550. (*See* PSR ¶ 41). U.S.S.G. § 2B1.1 speaks only of “loss.” The plain meaning of this word does not include intended loss. It is only in the Guidelines’ commentary that intended loss is addressed. The Sentencing Commission is not permitted to add to a guideline through the commentary. Ms. Westmoreland therefore objects to the six-level

enhancement applied in this case, and submits that a four-level enhancement is more appropriate consistent with the actual loss amount of \$27,550.

On June 30, 2020, Ms. Westmoreland received \$11,500 from the Small Business Administration from a loan submitted to the Economic Injury Disaster Loan Program (“EIDL”). (See PSR ¶ 23). On February 28, 2021, Ms. Westmoreland submitted a second application to the Small Business Administration which was denied. (See *id.* ¶¶ 25 & 26). Additionally, Ms. Westmoreland received approximately \$16,050 through the Unemployment Benefit Insurance Program. (See *id.* ¶ 34). The PSR states that “the total loss amount in this case is \$48,550 which includes \$27,550 in actual loss and \$21,000 in intended loss. (See PSR ¶ 35). Ms. Westmoreland submits that her total loss amount, pursuant to U.S.S.G. § 2B1.1(b)(1)(C), is \$27,550.

The word “loss,” is not defined within the Guideline itself, but it is defined in the commentary. It is the commentary that defines loss as “the greater of the actual loss or intended loss.” USSG §2B1.1, cmt. n. 3(A). Thus, the commentary differs from the Guideline. *United States v. Havis*, 927 F.3d 382, 385-386 (6th Cir. 2019).

The commentary is like an agency’s interpretation of its regulations. *Stinson v. United States*, 508 U.S. 36, 40–41 (1993). Courts should not, however, “reflexively defer to an agency’s interpretation. Before doing so, a court must find that the regulation is ‘genuinely ambiguous, even after [the] court has resorted to all the standard tools of interpretation to eliminate that ambiguity.’” *United States v. Riccardi*, 989 F.3d 476, 485 (6th Cir. 2021) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019)). And the Sixth Circuit has held that *Kisor*’s guidance about when to defer to agency interpretations applies to the commentary. *Id.* *Kisor* and *Riccardi* compel the conclusion that the loss amount here is \$27,550 (actual loss), not \$48,500 (intended loss).

Indeed, like the Sixth Circuit, the Third Circuit has noted the discrepancy between the

Guideline and the commentary, stating, “Only th[e] comment[ary], not the Guidelines’ text, says that defendants can be sentenced based on the losses they intended.” *United States v. Kirschner*, 995 F.3d 327, 333 (3d Cir. 2021). The commentary is only relevant if the text of the guideline is ambiguous. *Riccardi*, 989 F.3d at 485. But the term “loss” is not ambiguous.

Another district court in the Sixth Circuit recently observed that “[b]ecause “loss” in § 2B1.1 is not genuinely ambiguous, deference to the commentary is not appropriate.” *United States v. McKinney*, No. 22-cr-20249, 2022 WL 17547467, at \* 8 (E.D. Mich. Dec. 9, 2022). In reaching its decision the court found no Sixth Circuit case had addressed whether “loss” defined under §2B1.1 is ambiguous; however, the court did rely on cases originating in the Eleventh and Third Circuits.

For instance, in *United States v. Alford*, No. 3:21-cr052/MCR, 2022 WL 3577373 (N.D. Fla. Aug. 20, 2022), the court held that “loss” is not genuinely ambiguous. *See id.* at \*3. *Alford* considered the definitions of “loss” referenced in *Riccardi* as well as those that appear in “contemporary dictionaries,” and it concluded that “loss” is unambiguous in the sense that there “is at least one element shared by *all* of the ‘ordinary, contemporary, common meaning[s]’ for the word ‘loss’ in *all* of its various contexts—concrete materialization of harm. *Id.* There is no reasonable construction of the ‘plain and ordinary meaning’ of loss that includes harm that did not actually materialize.” *Id.* (alteration in original) (internal citation omitted). The court further found that “[l]oss’ cannot mean harm that never materialized” and that “the *only* ambiguity is that created by the Sentencing Commission itself by inserting ‘intended loss’ into the definition of ‘loss.’” *Id.* at \*3 & n.6. The court forcefully observed that it “‘ha[d] no business deferring to any other reading’ of the term, no matter how much the Government insists that doing so ‘would make

more sense.” *Id.* at \*3 (quoting *Kisor*, 139 S. Ct. at 2415). The court thus declined to give *Auer*<sup>1</sup> deference to the commentary “defining ‘loss’ to include ‘intended loss. Hence, as found in *McKinney*, “deference to the commentary’s definition of “loss” as including “intended loss” is not appropriate.” *McKinney*, 2022 WL 17547467, at \*9. Indeed, the *McKinney* court went on to rule that [i]nserting the word “intended” before the word “loss” changes the meaning of “loss” in a way that departs from its plain meaning. Because “intended” does not appear before “loss” in the guideline, the court chose to adhere to the plain meaning of the word “loss,” which it found involved only materialized harm. *McKinney*, 2022 WL 17547467, at \*8.

In *United States v. Banks*, 55 F.4th 246, 253 (3d Cir. 2022), the Third Circuit found that “the term ‘loss’ is unambiguous in the context of § 2B1.1.” The court’s analysis began with “the plain text of § 2B1.1.” 55 F.4th at 256. The court noted that “[t]he Guideline does not mention ‘actual’ versus ‘intended’ loss; that distinction appears only in the commentary. That absence alone indicates that the Guideline does not include intended loss.” *Id.* at 257. Moreover, the court observed that “dictionary definitions of ‘loss,’” and as also noted *Riccardi*, “confirm[s]” that “[t]he ordinary meaning of ‘loss’ in the context of § 2B1.1 is ‘actual loss.’” *Id.* at 257-59 & n.54. The court found that “[n]one of these definitions suggest an ordinary understanding that ‘loss’ means ‘intended loss.’” *Id.* at 258. It concluded that “in the context of a sentence enhancement for basic economic offenses, the ordinary meaning of the word ‘loss’ is the loss the victim actually suffered.” *Id.* The court therefore “accord[ed] the commentary no weight.” *Id.*

Based on this reasoning, Ms. Westmoreland submits that the actual loss in this case was \$27,550, the materialized harm in this offense. Ms. Westmoreland avers that the Guidelines’

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<sup>1</sup> *Auer v. Robbins*, 519 U.S. 452 (1997) (holding that a court should defer to an agency’s interpretation of its own ambiguous regulation, so long as that interpretation is reasonable, even if the court believes another reasonable reading of the regulation is the better reading).

calculations and resulting advisory Guidelines range would be follows if calculated properly under U.S.S.G. § 2B1.1:

Base Offense Level:	7
Specific Offense Characteristic pursuant to USSG §2B1.1(b)(1)(C):	+4
Specific Offense Characteristic pursuant to USSG §2B1.1(b)(12):	+2
Acceptance of Responsibility Credit:	-2
Total Offense Level:	11
Criminal History Category:	I
Starting guidelines range:	8-14months

**A. 18 U.S.C. § 3553(a) Factors.**

**(1) Nature and Circumstances of Offense and the History and Characteristics of the Defendant.**

**(a) Nature and Circumstances of the Offense.**

Ms. Westmoreland has accepted responsibility for her actions, has entered a plea of guilty in this matter, and she is now deemed a convicted felon. Ms. Westmoreland understands that it is her own actions that put her in jeopardy. She also fully understands that the funds she received were meant to help those persons who were severely impacted by the COVID-19 pandemic. She knows that receiving these funds was illegal and the funds could have been provided to someone

in need. To that end, Ms. Westmoreland has started making payments toward repaying the loan in this matter.<sup>2</sup>

**(b) History and Characteristics of Ms. Westmoreland**

Courtney Westmoreland was born on June 20, 1984 in Memphis, Tennessee to Sheila Mallard and Michael Westmoreland (deceased). Ms. Westmoreland lived with her mom in the East Memphis area as a child. Her father was not involved in her upbringing, but she was able to meet her father before he passed away. Ms. Westmoreland is the oldest child of the family. She had an older brother named Cortez Mallard, but he was murdered in 2012.<sup>3</sup>

Ms. Westmoreland has three children. She has two adult daughters and one teenage son. Ms. Westmoreland had her first child at age 15. Ms. Westmoreland had her second child in 2002 at age 18. Despite the fact Ms. Westmoreland was a young, single mom, she remained in high school and graduated from Wooddale High School in 2003.

After graduating high school, Ms. Westmoreland began working to provide for her children. She eventually went on to attend the University of Phoenix for four years and pursued a degree in Criminal Justice.<sup>4</sup> Unfortunately, Ms. Westmoreland did not finish her degree. Ms. Westmoreland says that she stopped attending the University of Phoenix so she could get a second job to provide for her children. However, she continues to advocate for her children to pursue their education, and she supports all her children financially. Both of her daughters are currently enrolled in college, and her son is a sophomore in high school.

Ms. Westmoreland has a substantial work history. In fact, Ms. Westmoreland has maintained steady employment since age 16. She currently has two jobs. She works as a cashier

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<sup>2</sup> Exhibit #1, U.S. Small Business Administration Payment Activity.

<sup>3</sup> Exhibit #2, Affidavit of Complaint.

<sup>4</sup> Exhibit #3, University of Phoenix Transcript.

at Kroger from 7:00 a.m. to 1:30 p.m. Monday through Friday, and she also works at Olympus Surgical Technologies from 3:00 p.m. to 11:30 p.m. Monday through Friday.

Attached is a letter from Ms. Westmoreland's employer at Kroger.<sup>5</sup> Ms. Kendra Harris, former store leader at Kroger, wrote "[s]ince working with Courtney, she has always been a team player and very helpful to all customers that she encounters daily." Ms. Harris went on further to say that, "[h]er (Ms. Westmoreland) work ethic speaks volumes to the contributions she provides to the company."

**(i) Mental Health/Emotional Health/Substance Abuse:**

Ms. Westmoreland has never received any sort of mental health treatment or counseling. (See PSR ¶ 72). In fact, there is no indication that it is necessary. Ms. Westmoreland denied the use of any controlled substances. *Id.* at ¶ 73. Furthermore, Ms. Westmoreland has no prior arrests or convictions for any drug related offenses.

**(c) Other pertinent 18 U.S.C. §3553(a) factors.**

**(i) reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense**

Ms. Westmoreland submits that she understands the seriousness of the offense, and she does respect the law. She has expressed great remorse over her actions and understands the consequences of them, explaining that because of her actions, she has become a "convicted felon and lost so many rights." (See PSR ¶ 38). She realizes what she has lost by making the decision to apply for those loans fraudulently. The requested sentence would reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense.

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<sup>5</sup> Exhibit #4, Letter from Ms. Kendra Harris.

**(ii) afford adequate deterrence to criminal conduct**

Ms. Westmoreland submits that the requested sentence will show other similarly situated offenders that receiving fraudulent government funds can have a detrimental impact on one's life for a small monetary gain.

**(iii) protect the public from further crimes of Ms. Westmoreland**

Ms. Westmoreland's arrest history does not include any prior felony convictions or any convictions for firearm offenses or drug offenses. Ms. Westmoreland's criminal history only includes offenses for driving while license suspended. Ms. Westmoreland currently has a valid driver's license, and she has not been charged or convicted of a driving offense or any offense since November 2014.

It appears that this offense was the result of a temporary and aberrant lack of judgement. Ms. Westmoreland is currently employed at two different places of employment, and she is a full-time mom and a stable member of her community. Additionally, since being on release for this offense, Ms. Westmoreland has not had any violations of her pretrial release. It is unlikely that she will commit any new offense, and there is no present danger to the public.

**(iv) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner**

Ms. Westmoreland graduated from Wooddale High School in May 2003, and she attended some college. (See PSR ¶¶ 74 & 75). Additionally, Ms. Westmoreland has a significant work history. The BOP will most likely be unable to afford her any further educational or vocational training.

**(v) The Need to Avoid Unwarranted Disparities**



Five current or former IRS employees were charged in this district with crimes relating to the Paycheck Protection Program (PPP) and EIDL Program, both federal stimulus programs authorized as part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Two of those defendants have already been sentenced to noncustodial sentences.

In *United States v. Tina Humes*, Case No. 22-20175-SHL, Ms. Humes was employed as a Lead Management and Program Assistant in the Human Capital Office with the Internal Revenue Service. Ms. Humes fraudulently obtained \$123,612 in COVID-19 relief funds. On October 28, 2022, Ms. Humes was sentenced to time served followed by a three-year period of supervised release with the added condition that the first six months were to be served on home detention.

In *United States v. Roderick White*, Case No. 22-20198-SHL, Mr. White was also an employee with the Internal Revenue Service as Contact Representative in the Wage and Investment Service Centers Department. Mr. White fraudulently obtained \$66,666. On December 12, 2022, Mr. White was sentenced to time served followed by a two-year period of supervised release with the added condition that the first six months were to be served on home detention.

Ms. Westmoreland obtained \$27,050 in pandemic funds, thousands of dollars less than those who have already been sentenced in this district. A sentence to time served followed by a two-year term of supervised release would avoid unnecessary sentencing disparities.

### **CONCLUSION**

Defense counsel will address the individual 18 U.S.C. §3553(a) factors at sentencing. Ms. Westmoreland asks the Court to sentence her to time served followed by a two-year term of supervised release. Defense counsel anticipates the sentencing hearing will take no longer than one hour. The defense anticipates that at least one individual will speak on Ms. Westmoreland's behalf.

Respectfully Submitted,

DORIS RANDLE-HOLT  
FEDERAL DEFENDER

/s/ Angela D. Smith  
Assistant Federal Defender  
200 Jefferson Ave., Suite 200  
Memphis, TN 38103  
(901) 544-3895

**CERTIFICATE OF SERVICE**

I, Angela D. Smith, certify that a true copy of the foregoing was forwarded via the Court's electronic filing system to Carroll Andre, Assistant United States Attorney, Clifford Davis and Odell Horton Federal Office Building, Suite 800, 167 North Main Street, Memphis, Tennessee, 38103.

This, the 10th day of March 2023.

/s/ Angela D. Smith  
Assistant Federal Defender

# EXHIBIT #1

Payment Activity on  
**03/01/2023**  
for Courtney Westmoreland



## Account

SBA Loan Number

[REDACTED]

Loan Type

Disaster COVID-19 Economic Injury

Loan Status

Disbursed Current

## Payment Schedule

Payment Schedule

One Time

Payment Frequency

One Time

Number of Installments

1

First Payment Date

03/01/2023

## Payment Details

Payment Method

Debit Card

Confirmation ID

[REDACTED]

Status

Processed

Amount

\$111 00

Card Number

\*\*\*\* \* [REDACTED]

Expiration Date

# EXHIBIT #2

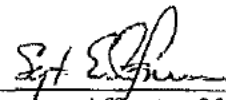
**AFFIDAVIT OF COMPLAINT****STATE OF TENNESSEE  
SHELBY COUNTY**

Personally appeared before me Sgt. Eric P. Freeman and made oath that on or about the 21<sup>st</sup> day of July 2012, in said County, and within the jurisdiction of the Criminal Court of Shelby County, Tennessee, one Kierra D. Brooks, ■, Female, whose last known address is ■ did unlawfully commit the offense of First Degree Murder 39-13-202 in the Perpetration of Attempted Especially Aggravated Robbery 39-13-403 and the essential facts constituting said offense and the source of the affiant's information are as follows:

On July 21, 2012, MPD Uniform Patrol responded to a shooting call at 2541 Corporate which is the location of the Homestead Suites Hotel. Upon arrival, Officers found the victim, Cortez Mallard deceased in the hotel lobby with numerous gunshot wounds. The Medical Examiners Office ruled the death a homicide due to the gunshot wounds. The investigation revealed that Kierra Brooks called the victim, Cortez Mallard and had him meet her at the Homestead Hotel. Kierra Brooks also had a codefendant waiting at the hotel to rob the victim. When Kierra Brooks met with the victim, the codefendant ran up and shot and killed the victim in an attempt to rob him. A witness identified Kierra Brooks from a six person photographic lineup as the person he saw at the scene when Cortez Mallard was shot and killed. This offense occurred in Memphis Shelby County Tennessee.

2012 JUL 30 PM 5:00

GENERAL SESSIONS



Affiant 201 Poplar

Sworn to and subscribed before me this 30 day of July, 2012.

12007384  
Judicial Commissioner, General Sessions Criminal Court

STATE OF TENNESSEE

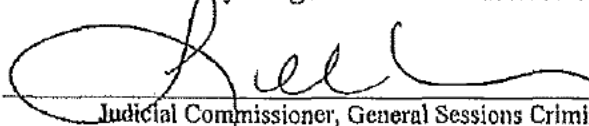
WARRANT

SHELBY COUNTY

TO ANY LAWFUL OFFICER OF THE STATE:

Information on oath having been made that the offense of First Degree Murder 39-13-202 in the perpetration of Especially Aggravated Robbery 39-13-403 has been committed, and accusing Kierra D. Brooks thereof. YOU ARE HEREBY COMMANDED IN THE NAME OF THE STATE TO ARREST said defendant and bring her before me or any Judge of the General Sessions Criminal Court of Shelby County.

This 30 day of July, 2012.  
Bond is set at \$ BTGS



Judicial Commissioner, General Sessions Criminal Court

# EXHIBIT #3



University of Phoenix®

**Unofficial Transcript**  
 Not For Official Use

<i>Record of:</i> Courtney Q Westmoreland
<i>Student Number:</i> 9022644971 / ***-**-****
<i>Birthdate:</i>
<i>Enrollment Status:</i> Withdrawn
<i>Enrollment Status Effective Date:</i> 04/29/2015

BSCJA/M Program GPA : 2.04

AACJ Program GPA : 2.02

**UNIVERSITY OF PHOENIX**

Mo/Year	Course ID	Course Title	Grade	Credits Attempted	Credits Earned	Quality Points	Rep
04/2010	GEN/195	FOUNDATIONS OF UNIVERSITY STUDIES	B+	3.00	3.00	9.99	
05/2010	FP/120	ESSENTIALS OF PERSONAL FINANCE	C+	3.00	3.00	6.99	
06/2010	SCI/163	Elements of Health and Wellness	C-	3.00	3.00	5.01	
08/2010	COM/170	ELEMENTS OF UNIVERSITY COMPOSITION AND COMMUNICATION I	A-	3.00	3.00	11.01	
09/2010	HUM/186	Media Influences on American Culture	B-	3.00	3.00	8.01	
10/2010	COM/172	ELEMENTS OF UNIVERSITY COMPOSITION AND COMMUNICATION II	W	0.00	0.00	0.00	
11/2010	PSY/211	ESSENTIALS OF PSYCHOLOGY	D	3.00	3.00	3.00	
01/2011	COM/172	ELEMENTS OF UNIVERSITY COMPOSITION AND COMMUNICATION II	C-	3.00	3.00	5.01	
02/2011	HUM/114	CRITICAL THINKING AND CREATIVE PROBLEM SOLVING	C-	3.00	3.00	5.01	
04/2011	SOC/100	Introduction to Sociology	B	3.00	3.00	9.00	
05/2011	REL/133	World Religious Traditions I	C+	3.00	3.00	6.99	
06/2011	CJA/214	Introduction to Police Theory and Practices	D	3.00	3.00	3.00	
08/2011	SCI/220	Human Nutrition	W	0.00	0.00	0.00	
09/2011	SCI/256	People, Science and the Environment	D+	3.00	3.00	3.99	
10/2011	MTH/208	COLLEGE MATHEMATICS I	W	0.00	0.00	0.00	
01/2012	SOC/315	Cultural Diversity	C-	3.00	3.00	5.01	
02/2012	PSY/320	Human Motivation	D	3.00	3.00	3.00	
03/2012	SOC/110	Teamwork, Collaboration, and Conflict Resolution	C-	3.00	3.00	5.01	
05/2012	CJA/204	Introduction to Criminal Justice	C+	3.00	3.00	6.99	
06/2012	COMM/470	COMMUNICATING IN THE VIRTUAL WORKPLACE	B	3.00	3.00	9.00	
07/2012	CJA/224	Introduction to Criminal Court Systems	W	0.00	0.00	0.00	





University of Phoenix®

**Unofficial Transcript**  
 Not For Official Use

Mo/Year	Course ID	Course Title	Grade	Credits Attempted	Credits Earned	Quality Points	Rep
08/2012	CJA/224	Introduction to Criminal Court Systems	W	0.00	0.00	0.00	
09/2012	COM/350	Organizational Communication	D-	3.00	3.00	2.01	
10/2012	CJA/224	Introduction to Criminal Court Systems	B	3.00	3.00	9.00	
11/2012	CJA/234	Introduction to Corrections	C	3.00	3.00	6.00	
01/2013	CJA/304	Interpersonal Communications	D+	3.00	3.00	3.99	
02/2013	CJA/314	Criminology	W	0.00	0.00	0.00	
03/2013	CJA/324	Ethics in Criminal Justice	B-	3.00	3.00	8.01	
04/2013	CJA/334	RESEARCH METHODS IN CRIMINAL JUSTICE	B	3.00	3.00	9.00	
06/2013	HUM/150	Introduction to Film Studies	F	3.00	0.00	0.00	R
07/2013	MTH/208	COLLEGE MATHEMATICS I	C-	3.00	3.00	5.01	
08/2013	CJA/314	Criminology	B-	3.00	3.00	8.01	
09/2013	HPE/170	HEALTH AND PHYSICAL EDUCATION	C-	3.00	3.00	5.01	
11/2013	SOC/105	INTRODUCTION TO POPULAR AMERICAN CULTURE	B+	3.00	3.00	9.99	
12/2013	HUM/150	Introduction to Film Studies	C-	3.00	3.00	5.01	
02/2014	MTH/219	Introduction to College Algebra	F	3.00	0.00	0.00	
07/2014	CJA/354	Criminal Law	W	0.00	0.00	0.00	
10/2014	MTH/209	COLLEGE MATHEMATICS II	W	0.00	0.00	0.00	
11/2014	CJA/344	Cultural Diversity Issues in Criminal Justice	W	0.00	0.00	0.00	
04/2015	CJA/354	Criminal Law	W	0.00	0.00	0.00	

**GPA**

	GPA	Credits Attempted	Credits Earned	Quality Points
Total Cumulative Credits:			84.00	
UOPX Cumulative:	2.04	90.00	84.00	177.06

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 End of Unofficial Transcript

# EXHIBIT #4

To Whom it May Concern,

I am writing this letter on behalf of Courtney Westmoreland to attest to her character and ethic.

Courtney began working at Kroger Sept 01, 2021, and I arrived at the store at the end of Oct as the store leader. Since working with Courtney, she has always been a team player and very helpful to all customers that she encounters daily. On numerous occasions, she has received customer compliments for her efforts to ensure all customers are highly satisfied, which is one of our top priorities here at Kroger. She is always on time and completes whatever tasks are before her. Her work ethic speaks volumes to the contributions she provides to the company.

Since working with Courtney, she has always spoken very highly of her children and granddaughter and the lengths that she goes through to ensure they are cared and provided for. She has worked hard in this time to make sure that her family receives a proper and solid education to pave the way for a future that they are proud of.

In closing, I can attest that Courtney has been as asset to the team and has not presented in any way that she bears no malice towards anyone.

Kind Regards,

A handwritten signature in black ink, appearing to read "K Harris".

Kendra Harris- Kroger Store Leader